No. 22,354

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

TELEDYNE, INC.

Appellant,

v.

NATIONAL LABOR RELATIONS BOARD,

Appellee.

Appeal from the United States District Court of the Northern District of California

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APPELLANT'S REPLY BRIEF

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ARGUMENT*

I. THE *EXCELSIOR* RULE IS INVALID BECAUSE IT WAS PROMULGATED WITHOUT COMPLIANCE WITH THE ADMINISTRATIVE PROCEDURE ACT.

The Board failed to comply with the Administrative Procedure Act, 5 U.S.C. § 1001, *et seq* (1964),** herein-

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* Words defined in Appellant's Opening Brief, will be used herein in the same manner as in said Opening Brief.

** The *Excelsior* Rule was announced by the Board on February 4, 1966. The APA then in force was the Act of June 11, 1946, ch. 324, 60 Stat. 238 (codified at 5 U.S.C. § 1001, *et seq* (1964)). It was superseded by the Act of September 6, 1966, 80 Stat. 383, (5 U.S.C.A. § 551, *et seq* (1967)), which made changes which do not affect the issues in this case. The citations in the text are to the APA in force when *Excelsior* was promulgated.

after called the "APA", when it promulgated *Excelsior,* and for this reason the rule cannot be enforced. *Wyman-Gordon Co. v. NLRB,* No. 7000 (1st Cir., June 12, 1968), 119 BNA Daily Labor Rep. at A-1 (June 18, 1968).

In *Wyman-Gordon, supra,* the United States Court of Appeals for the First Circuit held that in *Excelsior,* the Board was promulgating a "rule" within the meaning of the APA, and that the publication requirements of said Act applied. The Court stated:

> "Recognizing the problem to be one affecting more than just the parties before it, the Board chose to solicit the assistance of selected amici curiae, and, ultimately, to establish a rule which not only did not apply to the parties before it, but did not take effect for thirty days. In so doing we consider that the Board, to put it bluntly, designed its own rulemaking procedure, adopting such part of the Congressional mandate as it chose, and rejecting the rest. . .
>
> "In *Excelsior* . . . the Board did not decide a case between party and party, or, more exactly, it decided a case one way, and took occasion to lay down a future rule the other way. *Chenery* in no fashion suggests approval of this. On the contrary, to the extent the Board was not deciding a case, this is precisely where Congress had instructed it as to the procedure it should adopt. The Board has chosen to disregard Congress." (Footnote omitted.)

The Court further held that because of the failure to follow the APA a subpoena similar to the instant subpoena could not be enforced, and dismissed the Board's complaint. The Court stated that to do otherwise would permit the Board, or any other agency, to emasculate the APA.

Wyman-Gordon, supra, makes it clear that the arguments of the Board regarding its requirement to comply with the APA are fallacious. The cases the Board cites* hold only that once an agency decides to proceed by adjudication rather than rule-making, the publication procedures of the APA do not apply. While the Board, at its discretion, may proceed either on a case-by-case method or by establishing general rules, no case it cites permits the APA to be ignored when the Board promulgates a prospective general rule, like the *Excelsior* rule, which does not apply to the parties before it. As *Wyman-Gordon, supra,* indicated, to permit the Board to characterize what it was doing in *Excelsior* as an adjudication is to make a mockery of the distinction between the two kinds of procedures.

Kessler v. F.C.C., 326 F.2d 673 (D.C. Cir. 1963) (Cited by the Board as *Portage Broadcasting Corp. v. F.C.C.*) involved the publication of a procedural rule under Section 3(a), not Section 4, of the APA. Procedural rules are specifically exempted from Section 4, which requires publication of the proposed rule making in the Federal Register, and requires that an opportunity to participate in the rule making be afforded to all interested parties. The Court in *Kessler, supra,* held that, since the complaining parties had actual notice of the proper procedures, the lack of publication was not prejudicial. Failure of an Agency to comply with the APA with

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* *N.L.R.B. v. Seven-Up Bottling Company,* 344 U.S. 344 (1953); *SEC v. Chenery Corporation,* 332 U.S. 194 (1947); *NLRB v. Penn Cork & Closures, Inc.,* 376 F.2d 52 (2d Cir. 1967); *NLRB v. A.P.W. Products Co.,* 316 F.2d 899 (2d Cir. 1963); *NLRB v. E & B Brewing Co.,* 276 F.2d 594, (6th Cir. 1960); *Optical Workers Union v. NLRB,* 227 F.2d 687 (5th Cir. 1955); *Foreman & Clark, Inc. v. NLRB,* 215 F.2d 396 (9th Cir. 1954).

respect to the promulgation of rules of substance has a more serious effect than failure regarding procedural rules. Actual knowledge of a new rule, after it has been adopted, does not cure the defect, since it is not unawareness of the rule which is complained of, but rather that the manner in which the rule was adopted makes it invalid. The intent of Congress would be completely frustrated if agencies could circumvent the APA with regard to rules of substance, like the *Excelsior* rule.

The *Excelsior* rule is clearly not a rule of procedure. The Court in *Wyman-Gordon, supra,* stated:

> ". . . We can only conclude that *Excelsior's* purpose is what it appears to be on its face, a provision requiring the employer to furnish interested parties with affirmative assistance in conducting their election campaigns.
>
> "Such assistance is substance, not Board procedure. It differs only in degree and not in kind from a requirement, for example, that an employer having an assembly hall or a printing press should make it available to groups requesting it. . . ."

Similarly, *Reich v. Webb,* 336, F.2d 153 (9th Cir. 1964), involved notice under Section 3, not the hearing of all points of view under Section 4. Furthermore, the Court held that the rule involved was a common law rule, and therefore, not within the scope of the APA. *F.C.C. v. Schreiber,* 29 F.2d 517 (9th Cir. 1964) also involved a procedural rule. *City of Chicago v. F.P.C.,* 385 F.2d 629, (D.C. Cir. 1967) was a proceeding by adjudication and did not involve an invalid attempt at rulemaking. The Court simply held that petitioners were not prejudiced by the fact that the Commission proceeded by adjudication and not by rule-making.

On the basis of the foregoing, it is clear that the *Excelsior* rule was promulgated in a manner in direct violation of the APA and therefore cannot be enforced.

II. THE SUBPOENA IS UNENFORCEABLE BECAUSE THE *EXCELSIOR* RULE IS NOT VALID.

A. The *Excelsior* Rule Is Invalid Because It Is A *Per Se* Rule In Direct Violation Of United States Supreme Court Decisions.

NLRB v. A. J. Tower, 329 U.S. 324 (1946), and the other cases like it cited by the Board (Bd. Br. pp. 5-7), are cases where Board election rules have been upheld by courts. However, they do not hold that the Board has a *carte blanche* in this area. In addition, none of the cases concerned the Board acting in a manner contrary to clear Supreme Court prohibitions similar to *Nutone* and *Babcock.* The fact that the courts have upheld certain rules as valid exercises of the Board's power to regulate elections in no way supports the contention that every election rule must be upheld. See *NLRB v. Virginia Electric & Power Company,* 314 U.S. 469 (1941); *NLRB v. Ford Motor Company,* 114 F.2d 905 (6th Cir. 1940).

B. The *Excelsior* Rule, As Applied In The Instant Case, Is Invalid Because It Violates The Constitutionally Protected Right Of Privacy.

The Supreme Court has recently decided a case that confirms the appellant's standing to assert that *Excelsior* is invalid because it invades a constitutionally protected zone of privacy. In *Flast v. Cohen,* 36 U.S.L.W. 4601 (U.S. June 10, 1968), the Supreme Court held that a federal taxpayer has standing to challenge allegedly unconstitutional federal spending programs. The Court described the basis for standing as follows:

> ". . . The fundamental aspect of standing is that it focuses on the party seeking to get his complaint before a federal court and not on the issues he wishes to have adjudicated. The 'gist of the question of standing' is whether the party seeking relief has 'alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions . . .'"

If a mere taxpayer has a "personal stake" in a federal spending program, *a fortiori,* the appellant has a sufficient "personal stake" in the instant case to support its standing. It is clear that the appellant has a sufficient stake to assure that the Court will receive a full presentation of the issue in question.

Lamont v. Commissioner of Motor Vehicles, 269 F. Supp. 880, (S.D.N.Y.) *aff'd per curium,* 386 F.2d 449 (2d Cir. 1967), cited by the Board, involved the sale of the names and addresses of motor vehicle registrants, which were already a matter of public record. As the Court stated:

> "The information sold by the Commissioner is not vital or intimate. It is, moreover, in the category of 'public records', available to anyone upon demand. See Vehicle and Traffic Law § 401(2). Indeed, questions more troublesome than plaintiff's might arise if the State adopted a policy of 'privacy' or 'secrecy' with respect to such information. What the State has done in practical effect is to tap a small source of much-needed revenue by offering a convenient 'packaging' service." 269 F. Supp. at 883

The probability of home visitation was slight in that situation, while there is a great probability of such visits

in the instant situation. *Wheeler v. Sorensen Mfg. Co.,* 415 S.W.2d 582, 65 LRRM 2408 (Ky. 1967) was a tort action against an employer alleging it violated an employees right of privacy by showing a copy of her pay check to other employees. There is no indication that her address was given out. The constitutional issue presented in the instant case was not considered in *Wheeler.*

Martin v. City of Struthers, 319 U.S. 141 (1943), and *Staub v. City of Baxley,* 355 U.S. 313 (1958), involved local ordinances which the Court felt imposed blanket restrictions on the freedom of speech in the community. Certainly, in the instant situation, the union cannot claim that its freedom of speech is abridged because it is not given employee lists.

Addyston Pipe Steel Co. v. U.S. 175 U.S. 221 (1899) held that the "freedom of contract" provision of the United States Constitution does not pre-empt the federal government from enacting legislation under its commerce powers to declare certain contracts void. Similarly, *J. I. Case Co. v. NLRB,* 321 U.S. 332 (1944), held that the fact that an employer had employment contracts with a majority of his employees did not preclude the employees from exercising their right under the National Labor Relations Act to choose a representative for collective bargaining or warrant refusal by the employer to bargain. None of these cases can be used as authority for the proposition that a constitutionally protected right must give way to an administrative ruling.

On the basis of the foregoing, it is clear that the cases cited by the Board are not on point and that the *Excelsior* rule is invalid because it infringes upon a constitutionally protected right of privacy.

III. IRRESPECTIVE OF WHETHER THE *EXCELSIOR* RULE IS VALID, THE SUBPOENA IS UNENFORCEABLE UNDER SECTION 11 OF THE ACT BECAUSE IT DOES NOT CALL FOR THE PRODUCTION OF EVIDENCE TO BE USED BY THE BOARD.

The efforts by the Board to subpoena *Excelsior* lists, under Section 11 are the first attempts by the Board to subpoena matter which will not be used by the Board, and is not probative, or possibly probative, to any issue before it. The cases cited by the Board demonstrate the weakness of the argument that it has the power to do this.

In *Cudahy Packing Co. v. NLRB,* 117 F.2d 692 (10th Cir. 1941), the Court enforced a subpoena for the employer's payroll records. The records contained the names of employees which were needed by the Board to decide the issue of voting eligibility. As the Court stated: "It [the Company] does not, nor could it, contend that the evidence sought by the Board does not relate to the subject under investigation." 117 F.2d at 693. In *NLRB v. Northern Trust Co.,* 56 F.Supp. 335 (N.D. Ill. 1944), *aff'd.,* 148 F.2d 24 (7th Cir. 1945), the Board sought to subpoena certain books and records to determine (a) whether the employer's operations affected interstate commerce, (b) the appropriate bargaining unit, and, (c), the sufficiency of the union's interest showing. The appellant has furnished the Board sufficient information to determine voting eligibility, the sufficiency of the interest showing, and the appropriate bargaining unit.

In *NLRB v. C.C.C. Associates, Inc.,* 306 F.2d 534 (2d Cir. 1962), the Board subpoenaed data to determine whether a corporation was a successor to another corporation's back pay liability. *NLRB v. United Aircraft*

Corporation, 200 F.Supp. 48 (D. Conn. 1961), *aff'd. per curiam* 300 F.2d 442 (2d Cir. 1962), involved a subpoena for employment records which might indicate whether the employer unlawfully discriminated against strikers.

Endicott Johnson Corp. v. Perkins, 317 U.S. 501(1943) involved a subpoena for relevant information to be used to determine whether there was a violation of the Walsh-Healy Public Contracts Act. *Hamilton v. NLRB,* 177 F.2d 676 (9th Cir. 1949) held that whether there was indeed a violation in the matter under investigation is not to be determined in a subpoena enforcement proceeding, where the subpoenaed material was relevant to said investigation, and was to be used by the agency. *U.S. v. Powell,* 379 U.S. 48 (1964), *U.S. v. Feaster,* 376 F.2d 147 (5th Cir. 1967), *NLRB v. Gunaca,* 135 F.Supp. 790 (E.D. Wis. 1955) and *Adams v. F.T.C.,* 296 F.2d 861 (8th Cir. 1961) involved subpoenas of relevant information to be used by the agencies themselves.

NLRB v. Menaged, 193 F.Supp. 135 (D.Md. 1961) and *NLRB v. New England Transportation Co.,* 14 F.Supp. 497 (D. Conn. 1936) involved the subpoenas of items intended for use by the Board. *NLRB v. Groendyke Transport, Inc.,* 372 F.2d 137 (10th Cir. 1967) involved the conduct of a mail ballot, and had nothing to do with enforcing Board subpoenas. (The election in the instant case was not conducted by mail ballot.)

In these, and all the cases cited by the Board, it is obvious that the Board sought information which was probative of issues which the Board was required to decide. The information was used by the Board for this purpose. Clearly, in all these circumstances, the information sought was "evidence." These cases, therefore, do not support the Board's contention that data

which will not be used by the Board, and is not probative of any issue before the Board is also "evidence" within the meaning of the Section 11.

The Board cites *NLRB v. Friedman,* 352 F.2d 545 (3d Cir. 1965) to support its contention that subpoenaed information can be turned over to the union. In that case the Board sought certain records of the employer in order to prove that the employer had discriminatorily transferred some of its operations. The employer defended on the grounds that the Board intended to use a a union accountant and economist to aid it in analyzing these records. The Court found, however, that the garment industry was exceedingly complex and that the Board itself had no experts capable of analyzing the records. Furthermore, the only experts in the entire country were employed by either the employer, its competitors or the union. Under these unusual circumstances, the Court enforced the subpoena and allowed the use of a union expert by the Board.

The *Friedman* case is obviously distinguishable. The subpoenaed material was probative of an issue to be decided by the Board and was thus clearly "evidence," the information was to be used by the Board. The narrowness of the Court's holding in *Friedman* is further demonstrated by the scope of its order. The union accountant and economist was forbidden to reveal the information to anyone except to counsel for the preparation of the unfair labor practice case. The names and addresses of all customers and suppliers were also deleted before the records were shown to the union expert. The Court added that any deviation from these limitations would be subject to contempt. The *Friedman* case therefore stands for the proposition that such subpoenaed information may not be turned over to the union for its own use, but rather may be given to a union for

the purpose of analysis, subject to an appropriate protective order, to aid the Board, where such aid is absolutely necessary.

The Board in its brief also discusses *FTC v. American Tobacco Co.*, 264 U.S. 298 (1924), and *United States v. Morton Salt Co.*, 338 U.S. 632 (1950). The former case involved a petition for writs of mandamus brought by the Attorney General to compel inspection of the records of two tobacco companies. The Supreme Court affirmed the district court's refusal to issue the writs. The Court found that in its search for evidence, the Federal Trade Commission had cast its net too broadly. In essence, the Court required the agency to demonstrate some grounds for supposing that each item sought was *actually* probative. This rule appears to have been subsequently relaxed. In *United States v. Morton Salt Co., supra,* the Court upheld orders by the Federal Trade Commission requiring that certain salt companies submit special reports with respect to compliance with a Court's decree. The Court appears to have indicated in its opinion that information may be required so long as there is a *possibility* that the information sought may be probative of a violation. This relaxation, however, in no way affects the disposition of the instant case. In our case, it is obvious that the *Excelsior* list sought will not be used by the Board and is not probative of any issue to be decided by the Board.

It is therefore submitted that the cases cited by the Board are not relevant, and the subpoena is not enforceable under Section 11.

IV. THE SUBPOENA IS UNENFORCEABLE UNDER 28 U.S.C. § 1337 BECAUSE SECTION 11 OF THE ACT IS A SPECIFIC STATUTE, DEALING WITH THE SUBJECT MATTER, WHICH PREVAILS OVER THE GENERAL PROVISIONS OF 28 U.S.C. § 1337.

The Board is claiming that the Court has jurisdiction to enforce the *Excelsior* rule under 28 U.S.C. § 1337, which gives the Court jurisdiction over "all suits and proceedings under any law regulating commerce." In so doing, the Board is seeking to circumvent the clear legislative effort to limit the scope of its subpoena powers, and is attempting to convince the Court to allow what Congress specifically avoided doing under Section 11, *i. e.*, authorize a "roving commission."

Since the subpoena is invalid under Section 11 (see Appellant Opening Brief pages 6-14), which specifically governs the Court's power to enforce Board subpoenas related to hearings or investigation under Section 9 of the Act, it cannot be saved by the broad scope of 28 U.S.C. § 1337. The courts have adopted a firm rule of construction designed to foreclose the situation where a result which is precluded by a specific statute is permitted under a general statute. To rule otherwise would render the specific statute nugatory and frustrate the legislative policy behind such statute. If the Court were to enforce the instant subpoena under 28 U.S.C. § 1337, it would have this undesired result.

The rule of construction described above was best stated, and clearly applied, by the Supreme Court in *D. Ginsberg & Sons, Inc. v. Popkin,* 285 U.S. 204 (1932). That case dealt with the jurisdiction of courts to order arrests under the Federal Bankruptcy Act. Section 2 of the Bankruptcy Act gave bankruptcy courts jurisdiction

to "make such orders, issue such process, and enter such judgment in addition to those specifically provided for as may be necessary for the enforcement of the provisions of this Act." This provision, broadly construed, would give the Court jurisdiction to order the arrest of bankrupt persons or to order the arrest of officers of bankrupt persons. However, Sections 9 (a) and 9 (b) of the Bankruptcy Act dealt specifically with circumstances under which bankrupt persons could be arrested. Sections 9 (a) and 9 (b) did not expressly exclude arrests under other circumstances, so it was argued that an arrest under the broad section was permissible. The Court held that if the Court did not specifically have jurisdiction to order arrests under Sections 9 (a) or 9 (b), jurisdiction could not be obtained under the broader provisions of Section 2. The Court said:

> "General language of a statutory provision, although broad enough to include it, will not be held to apply to a matter specifically dealt with in another part of the same enactment. *United States v. Chase,* 135 U.S. 255, 260. Specific terms prevail over the general in the same or another statute which otherwise might be controlling. *Kepner v. United States,* 195 U.S. 100, 125. *In re Hassenbusch,* 108 Fed. 38. *United States v. Peters,* 166 Fed. 613, 615." 285 U.S. at 208.

D. Ginsberg & Sons is very close to the instant case. There, a statute dealt specifically with a subject — jurisdiction to order arrests. It did not provide for jurisdiction to order the arrest sought. An attempt was made to use a general statute to grant jurisdiction to order the arrest not provided for in the specific statute, but the Court stopped the attempt and said the specific statute was the exclusive source of jurisdiction over the subject. Here, a statute also deals specifically with a subject —

the jurisdiction of the Board to enforce subpoenas to produce evidence in hearings or investigations related to Sections 9 and 10 of the Act. As has been shown, it does not provide jurisdiction to enforce the instant subpoena. Here also there is a general statute, which is being used in an attempt to grant jurisdiction to enforce the subpoena. The Court should rule, as in *Ginsberg,* that the specific statute, Section 11, is the exclusive source of jurisdiction to enforce such subpoenas.

The *Ginsberg* rule of construction has been quoted innumerable times by federal and state courts as the cardinal rule of statutory construction where general and specific statutes are in conflict. See, e. g. 2 Sutherland, *Statutory Construction* §§ 4704 n. 1, 5204 n. 4 (Cum. Supp. 1968). Indeed, 28 U.S.C. § 1337 has been held not to be a residuary source of jurisdiction in the labor field.

In *United Electrical Contractors Assoc. v. Ordman,* 258 F.Supp. 758 (S.D.N.Y. 1965), the Court held it did not have the power under Section 10 (f) of the Act to review the refusal of the General Counsel of the Board to issue a complaint. It then held that 28 U.S.C. § 1337 is not an alternative source of jurisdiction where there is a specific statute governing the matter: "It is clear that general statutes do not confer jurisdiction where an applicable regulatory statute precludes it." 258 F. Supp. at 762, 763.

Fourco Glass Co. v. Transmirra Products Corp., 353 U.S. 222 (1957), dealt with venue provisions of the Federal Judicial Code. 28 U.S.C. § 1400 (b) provided venue in patent cases in any district where defendant has committed patent infringements. 28 U.S.C. § 1391 provided venue over corporations generally in any district where a corporation did business. The Court said that the specific statute dealing with patents prevailed:

> "We think it is clear that § 1391 (c) is a general corporation venue statute, whereas § 1400 (b) is a special venue statute applicable, specifically, to *all* defendants in a particular type of actions, *i.e.*, patent infringement actions. In these circumstances, the law is settled that 'However inclusive may be the general language of a statute, it "will not be held to apply to a matter specifically dealt with in another part of the same enactment. . . . Specific terms prevail over the general in the same or another statute which otherwise might be controlling." *Ginsberg & Sons v. Popkin,* 285 U.S. 204, 208.' *MacEvoy Co. v. United States,* 322 U.S. 102, 107." 353 U.S. at 228-29.

Venue in patent cases was held to be determined solely by the section of the Code dealing with patent venue — the general venue sections did not provide alternative sources of venue.

Buffum v. Chase National Bank, 192 F.2d 58 (7th Cir. 1951), is very similar to the *Fourco case.* It also dealt with venue provisions of the Federal Judicial Code. 12 U.S.C. § 94 provided venue in actions against banks in any district where the bank has its place of business. 28 U.S.C. § 139 provided venue in actions against corporations in any district where the corporation was doing business. The question was whether venue was proper in an action against a bank in a district where the bank was doing business but where it did not have its place of business. The Court said again that the specific statute prevailed. The general venue provision did not provide an alternative source of venue to the specific bank venue provision. The Court quoted the familiar rule of construction:

> " 'It is a well-settled principle of construction that specific terms covering the given subject matter will

prevail over general language of the same or another statute which may otherwise prove controlling.' " 192 F.2d at 61.

Boire v. Greyhound Corp., 376 U.S. 473 (1964) held that the conduct of an election under Section 9 of the Act can not be enjoined under 28 U.S.C. § 1337 because of an alleged improper Board determination of an appropriate bargaining unit. The Court ruled that the Board had not acted in excess of its powers, and action under a 28 U.S.C. § 1337 would ignore the specific statutory scheme established by Congress.

The weakness of the Board's argument is apparent from an analysis of its argument that there is no specific statute for enforcement of its election rules and the cases it cites. In no cited case was the applicability of 28 U.S.C. § 1337 weighed against a different statute covering the specific matter in question.* Some cases enforcing the

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* In *Capital Service, Inc. v. NLRB*, 347 U.S. 501 (1954), two issues were involved. First, to determine the applicability of 28 U.S.C. § 1337 the court considered whether cases arising under the Act were cases arising under laws regulating commerce. The court held, of course, that labor cases did arise under laws regulating commerce. The only other issue was whether the wording of 28 U.S.C. § 2283, granting only limited power to federal courts to stay state court proceedings, allowed the court to grant the requested injunction. No conflict in jurisdictional statutes was involved. *Amalgamated Clothing Workers v. Richman Bros.*, 348 U.S. 511 (1955), involved exactly the same issue as *Capital Service, Inc. v. NLRB, supra. NLRB v. New York State Labor Board,* 106 F.Supp. 749 (S.D. N.Y. 1952), did not even involve § 1337 — jurisdiction under that statute was clear. The court merely held that it had authority to issue an injunction even where that power was not expressly granted by statute. *Federal Maritime Commission v. Atlantic & Gulf/Panama Canal Zone*, 241 F.Supp. 766 (S.D. N.Y. 1965), also involved § 1337, but there was no issue

Board's subpoenas for *Excelsior* lists also found jurisdiction under 28 U.S.C. § 1337, *NLRB v. British Auto Parts, Inc.*, 64 L.R.R.M. 2786 (C.D. Cal. 1967); *NLRB v. Wolverine Industries Div.*, 64 L.R.R.M. 2187 (E.D. Mich. 1967); *N.L.R.B. v. Rohlen*, 64 LRRM 2169 (N.D. Ill. 1967), *aff'd on alternate ground*, 385 F.2d 52 (7th Cir. 1967). But these cases merely recited the inapplicable cases relied upon by the Board. *NLRB v. Hanes Hosiery Div.*, 384 F.2d 188 (4th Cir. 1967) did not even

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as to whether it applied to the case. The main issue was whether a court could issue an injunction to aid an administrative agency even though there was no express authorization for such an injunction. *Los Angeles Trust Deed & Mortgage Exchange v. SEC*, 285 F.2d 162 (9th Cir. 1960), did not involve § 1337. It merely held that a court has inherent equity powers to aid in the effectuation of legislative policy. *Reich v. Webb*, 336 F.2d 153 (9th Cir. 1964), and *Walling v. Brooklyn Braid Co.*, 152 F.2d 938 (2d Cir. 1945), involved exactly the same issue as *Los Angeles Trust Deed & Mortgage Exchange, supra. United States v. Feaster*, 330 F.2d 671 (5th Cir. 1964); 376 F.2d 147 (5th Cir. 1967) held that § 1337 gives equity powers to aid in the enforcement of legislative policies. *United States v. Shafer*, 132 F.Supp. 659 (D. Md. 1955), involved solely the issue of whether a court can issue an injunction to enforce regulations of the Department of Agriculture without express legislative authorization. *I.A.M. v. Central Airlines, Inc.*, 372 U.S. 682 (1963); *United States v. West Virginia*, 295 U.S. 463 (1935); *Texas & N.O.R. v. Ry. Clerks*, 281 U.S. 548 (1930); *Sanitary District v. United States*, 226 U.S. 405 (1925); *In re Debs*, 158 U.S. 564 (1895); *Florida East Coast Ry. v. U.S.*, 348 F.2d 682 (5th Cir. 1965); *Shafer v. U.S.*, 229 F.2d 124 (4th Cir. 1956) hold that courts of equity can issue injunctions despite the absence of any express statutory authority. Not a single case referred to above involved the problem of a specific jurisdictional statute conflicting with a general jurisdictional statute. *Leedom v. Kyne*, 358 U.S. 184 (1958) is another case where there was no conflict in statutes. The Court held that a district court had jurisdiction under 28 U.S.C. § 1337 to set aside the Board's determination of a bargaining unit, where the Board clearly acted in direct violation of Section 9 of the Act.

discuss the issue. The Board admits, and argues, that the instant subpoena is related to a hearing or investigation under Section 9 of the Act. It is clear that Section 11 is a specific statute governing enforcement of subpoenas related to such a hearing or investigation, and specifically covers subpoeans related to enforcement of election rules, based on Section 9. Under the rule of construction discussed above, it is clear that 28 U.S.C. § 1337 can not be used to enforce the instant subpoena.

Even if it is determined that the Court has power to enforce the subpoena under 28 U.S.C. § 1337, this Court should remand the case to the District Court for decision on this issue. The District Court specifically refused to rule on the count in the complaint involving 28 U.S.C. § 1337. This Court should not decide this issue until it has been passed on by the court below.

It is well settled that the granting of an injunction, the relief requested by the Board under 28 U.S.C. § 1337, is a matter for the discretion of the District Judge acting as Chancellor. *United States v. W. T. Grant Co.,* 345 U.S. 629 (1953); *United States v. Board of Education of Greene County,* 332 F.2d 40 (5th Cir. 1964); *Esquire Inc. v. Esquire Slipper Manufacturing Co.,* 243 F.2d 540 (1st Cir. 1957).

In *Oser v. Wilcox,* 338 F.2d 886 (9th Cir. 1964), this Court held that a matter involving the exercise of discretion by a District Court Judge will be remanded to the District Court for determination before it is passed upon by the Court of Appeals.

Judge Coffin, in his dissenting opinion in *Wyman-Gordon,* No. 2000 (1st Cir. June 12, 1968), 119 BNA Daily Labor Rep. at A-1 (June 18, 1968), felt that the *Excelsior* rule was not enforceable under Section 11 of the Act. Since the District Judge had not ruled on the

Section 1337 ground, he stated that this issue should have been remanded for consideration by the District Judge.

The cases cited by the Board are inapplicable. *M.O.S. Corporation v. John I. Haas Co.,* 375 F.2d 614 (9th Cir. 1967), and *S & S Logging Co. v. Barker,* 366 F.2d 617 (9th Cir. 1966) did not involve issues requiring an exercise of the District Court's equitable discretion.

Therefore, it is clear that even if this Court were to determine that the instant subpoena could be enforced under 28 U.S.C. § 1337, the matter should be remanded to the District Court. However, even if the Court were to rule the 28 U.S.C. § 1337 were applicable, and also decide not to so remand this issue, it is submitted that this Court should not exercise its discretion to enforce the subpoena.

The Court should not exericse its discretion until the appellant has had a hearing before the Board on the issue of the validity of the *Excelsior* rule as applied in the instant case. The appellant has requested such a hearing and is prepared to demonstrate that the Union had ample access to employees, and that under the facts of the instant case, the *Excelsior* rule should not have been applied.

The proper forum to initially hold a hearing on the validity of the *Excelsior* rule, as applied to in the instant case, is the Board, which was established by Congress to become expert with respect to industrial relations matters. The Board is seeking to circumvent holding a hearing at which *Excelsior* could be properly tested.

Congress has provided the Board with other means to enforce the *Excelsior* rule. It can, and has, set aside an election where the rule has veen violated. The Board can, and on numerous occasions has, ordered multiple elections in order to effectuate its rules concerning the

validity of elections. In addition, the Board can act pursuant to Section 8(a) of the Act, and proceed on the theory that the appellant has committed an unfair labor practice. If this were done, the appellant would have a right to a hearing at which time could fully present its views and position with respect to the *Excelsior* rule. In addition, if after such a hearing it was determined that the appellant violated a provision of Section 8(a) of the Act, the Board could issue an appropriate order, which a federal court would have the power, as authorized by Congress, to enforce. The Board has not shown that there is any reason for the Court to exercise its extraordinary power to grant an injunction.

It is therefore clear that there is no basis to enforce the subpoena under 28 USC § 1337.

CONCLUSION

For the reasons hereinabove set forth, the Court should reverse the decision to the lower court, and order the instant action dismissed.

Respectfully submitted,
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CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

SEYMOUR SWERDLOW

Seymour Swerdlow